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No. 95-1649

In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.* – which provides for the civil commitment and long-term care and treatment of sex offenders who are found beyond a reasonable doubt both (1) to be suffering from a mental abnormality or personality disorder and (2) to present a continuing danger to society through a likelihood of committing future sexually violent offenses – violate substantive due process principles?

2. What level of constitutional scrutiny applies to a claim that civil commitment of a sexually violent predator for care and treatment deprives him of a liberty interest in violation of substantive due process principles?

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OPINIONS BELOW

The March 1, 1996, decision of the Kansas Supreme Court, holding that the Kansas Sexually Violent Predator Act violates substantive due process principles, is reported, 259 Kan. 246, 912 P.2d 129 (1996), and is included in the appendix to the State's petition for a writ of certiorari ("Pet. App."). *See* Pet. App. 1a-59a. Several rulings of the state district court in this proceeding also have been reprinted in the Joint Appendix ("J.A.").

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision in this case on March 1, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on April 12, 1996, and this Court granted the petition on June 17, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.*, is set forth in full at Pet. App. 61a-72a. As noted there, there have been some amendments subsequent to the proceedings in this case, but they are minor and not material to the constitutional issues presented here.

STATEMENT OF THE CASE

Procedural History

Petitioner, the State of Kansas, initiated this action against Respondent, Leroy Hendricks, on August 17, 1994. J.A. 4. The State sought to have Hendricks, a convicted child molester, civilly committed to a state mental institution for long-term care and treatment under the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. 59-29a01 *et seq*. The trial court rejected Respondent's constitutional challenges to the Kansas statute, J.A. 120-24, and, following a trial, the jury returned a verdict finding, beyond a reasonable doubt, that Hendricks is a sexually violent predator. *Id.* at 357, 360. The trial court ordered Hendricks committed to Larned State Hospital for care and treatment. *Id.* at 361.

On March 1, 1996, the Kansas Supreme Court reversed, concluding that the Kansas statute violates substantive due process principles. Pet. App. 1a-59a. The State requested that the Kansas Supreme Court stay its mandate pending the State's efforts to secure review of that court's decision in this Court. On March 22, 1996, the Kansas Supreme Court directed that its mandate be stayed for 30 days to permit the State to seek certiorari review in this Court. Pet. App. 60a. On April 22, 1996, this Court stayed the Kansas Supreme Court's decision pending the outcome of the proceedings in this Court. On June 17, 1996, this Court granted review of the State's petition in No. 95-1649, and Hendricks' conditional cross-petition in No. 95-9075, and consolidated the cases for oral argument.

Statement of Facts

1. The Kansas Sexually Violent Predator Act

The Kansas Sexually Violent Predator Act ("the Act"), Kan. Stat. Ann. § 59-29a01 *et seq.*, Pet. App. 61a-72a, was enacted in 1994 to address the problem of recidivist sexual offenders.[1] The Act grew out of the efforts of an Ad Hoc Sexual Offender Task Force and followed the highly publicized, brutal rape and murder of Stephanie Schmidt, a Kansas college student, by a convicted rapist recently released from prison. *See* Pet. App. 25a. The sponsor of the Kansas bill (S.B. 525), Senator Vancrum, declared that the Act was designed "to protect our communities from those offenders who pose the greatest danger to society by providing for treatment and commitment of sexually violent predators until they are no longer a danger." J.A. 460. He further stated that "[t]he bill is narrowly tailored to focus on the smaller number of habitual sex offenders who, because of their psychological makeup, pose an immediate danger to the public as soon as they are released from prison." *Id.* at 461; *see also id.* at 545-47. Several law enforcement officials also testified to the high recidivist rates for sex offenders. *See id.* at 475, 490, 492-96.[2]

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[1] As the Kansas Supreme Court observed, the Act is modeled on sexually violent predator provisions included in the Community Protection Act that the State of Washington enacted in 1990. *See* Pet. App. 4a.

[2] Some mental health groups or associations opposed the bill, although primarily on two grounds unrelated to the constitutional issue: (1) that there would be practical problems such as keeping the general population of mentally ill patients in state institutions safe from sexual predators and financing a sexual predator treatment program and (2) that by including sexual predators in the class of "mentally ill" persons subject to

The Act begins with a preamble which recognizes that sexually violent predators suffer from mental problems that require different treatment – both in terms of the type and length of treatment required – than many people committed under general involuntary civil commitment statutes. The preamble also recognizes that sexually violent predators create special risks to society. The preamble reads as follows:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general Kansas involuntary civil commitment statute], which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under [the general Kansas involuntary civil commitment statute], sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of

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involuntary commitment, the statute improperly stigmatized other mentally ill persons. *See, e.g.*, J.A. 463-64, 504-06, 512-15, 531-32, 536, 538-39, 562-64, 567-68, 572, 574-75.

> this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general Kansas involuntary civil commitment statute] . . . , therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.

Kan. Stat. Ann. § 59-29a01. The Act then defines several key terms which address the constitutional substantive due process requirements of *dangerousness* and *mental illness*. Among these are "sexually violent predator," which "means any person who has been *convicted of or charged with* a sexually violent offense and who suffers from a *mental abnormality* or personality disorder which makes the person *likely to engage* in the predatory acts of sexual violence." § 59-29a02(a) (emphasis added).[3] The Act defines "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." § 59-29a02(b). "Sexually violent offense" is defined to include any of a list of several Kansas sex crimes, such as rape, indecent liberties with a child, sodomy, indecent solicitation of a child, sexual exploitation of a child, sexual battery, aggravated versions of the foregoing offenses, or conspiracy or attempt to commit such offenses. § 59-29a02(e).

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[3] " 'Predatory' means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization." Kan. Stat. Ann. § 59-29a02(c).

The version of the Act in effect at the time of Hendricks' proceeding provided that 60 days before the anticipated release of a "sexually violent predator," the agency with authority over the release must notify the prosecutor in the county where the person was charged. § 59-29a03. (The current version requires that the Attorney General be notified). The prosecutor then has 45 days to file a petition invoking the Act's procedures. § 59-29a04. (Under the current version, all sex predator proceedings are handled by the Attorney General's office rather than by the county attorneys and the time periods are somewhat different). The next step is for the district court to determine whether there is probable cause to believe that the person is a sexually violent predator and, if so, to order the person transferred to an appropriate facility for an evaluation. § 59-29a05.

Promptly after the filing of the petition, the district court must conduct a trial to determine whether the person is a sexually violent predator. § 59-29a06. In the trial, the person is entitled to the assistance of counsel and the provision of a mental health professional to evaluate the person at public expense if necessary. *Id*. If the person makes a jury demand, then the trial is before a jury. *Id*. The trier of fact must determine whether the person is a sexually violent predator beyond a reasonable doubt. § 59-29a07. If that determination is made, then the person is committed to the custody of the secretary of social and rehabilitation services for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." § 59-29a07(a).

The Act further provides that the mental condition of a person committed under the Act must be reevaluated on an annual basis, including district court review and a determination whether there is probable cause to believe

that it is safe to release the person. § 59-29a08. If the court concludes that there is probable cause to believe that the person may safely be released, then the burden of proof is on the State to demonstrate beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that it is not safe to release the person. *Id*. The person also may file a petition seeking release at any time, § 59-29a11, or those having custody of the person may determine that the person's condition has so changed that release is appropriate and authorize the person to petition the court for release. § 59-29a10. The procedures and burden of proof in such a proceeding are the same as for a hearing on annual review. *Id*.

2. The Trial Court Proceedings

The State initiated this civil commitment proceeding against Leroy Hendricks on August 17, 1994, by filing a petition in state district court seeking the commitment of Hendricks as a sexually violent predator under the Act. J.A. 4-8. The State filed the petition against Hendricks in anticipation of his imminent release from prison after he had served almost ten years of a five-to-twenty-year sentence on child molestation charges. *Id*. at 5.[4] On August 19, 1994, Hendricks appeared before the district court with counsel and moved to dismiss the petition. *Id*. at 32-35. At the August 19 hearing, Dan Crask, a licensed specialist clinical social worker, testified that, in his opinion and based on a review of Hendricks' records, Hendricks met the diagnostic criteria for pedophilia,[5] J.A.

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[4] In 1984, Hendricks pled guilty to two counts of indecent liberties with a child, while a third count was dismissed as part of the plea agreement. J.A. 5.

[5] The American Psychiatric Association publishes a compendium of mental disorders entitled the *Diagnostic and*

24, and that pedophilia is a condition that "through research, we know has a certain amount of recidivism to it." *Id.* at 26. The district court reserved ruling on the constitutionality of the Act, concluded that there was probable cause to believe Hendricks was a sexually violent predator, and ordered that Hendricks be evaluated at the Larned State Security Hospital. *Id.* at 32-36. Hendricks did not cooperate. After another hearing on September 13, 1994, the district court conditionally ruled that proceedings under the Act are civil, not criminal. *Id.* at 36-43. The court then held a hearing on September 16, 1994, to determine whether Hendricks should be compelled to participate in a mental evaluation and, on September 23, the district court issued a final ruling that the proceeding was civil, not criminal, and that Hendricks therefore must comply with the Court's previous evaluation orders, *id.* at 120-24, which he eventually did.

Pursuant to the Act, the district court conducted a jury trial on October 3-5, 1994, to determine whether Hendricks was a sexually violent predator subject to civil commitment. J.A. 125-361. Hendricks was the first witness. He testified that he was sixty years old, *id.* at 125, and that his history of sexual involvement with children began in 1955 – he was 20 – when he exposed his genitals

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Statistical Manual of Mental Disorders. This work represents an effort to incorporate studies and other materials regarding the existence, components and diagnosis of mental disorders. The current version, which is the fourth edition and dated 1994, is commonly referred to as DSM-IV. DSM-IV sets out the criteria for a diagnosis of pedophilia, which is a recognized mental disorder. *See* DSM-IV 527-28. Hendricks' diagnosis will be discussed in more detail in the portion of the State's brief which addresses the substantive due process "mental illness" requirement, subpart B.3.a. below.

to two young girls. *Id.* at 131. One of those victims testified in Hendricks' sexual predator proceeding, describing in some detail how Hendricks had exposed himself to the girls while seated in his car and how he had invited them to get in the car and play with his penis. *Id.* at 191-93. In 1957, Hendricks was convicted of lewdness for playing strip poker with a 14-year-old girl, *id.* at 133, and in 1960, while working for a carnival, he molested two young boys – ages 7 and 8 – by fondling their genitals. *Id.* at 135-36.

After three years of imprisonment, Hendricks was paroled and then promptly arrested, convicted and imprisoned for molesting a seven-year-old girl by placing his fingers in her vagina. *Id.* at 139-41. He testified that he had befriended the girl's family so that they would permit him to take her on trips alone, during which he would molest her. *Id.* at 140. Hendricks testified that he understood his behavior was wrong, but that he was unable to control himself. *Id.* at 140. As a result of his molestation of this girl, Hendricks was adjudicated a sexual psychopath under Washington law and civilly committed to a mental institution for treatment until 1965, when he was released. *Id.* at 142-44. In 1967, Hendricks was again convicted and imprisoned for molesting another young boy and girl. *Id.* at 146-48. Hendricks had repeatedly performed oral sex on the 8-year-old girl and fondled the 11-year-old boy over a period of two months. *Id.* Again, Hendricks stated that he committed these crimes because he had an urge to do so which he did not even try to control. *Id.* at 149. After being released from prison in 1972, Hendricks did attend outpatient treatment for several months, but eventually he stopped appearing for appointments and did not respond to communications to reschedule or continue them. *Id.* at 151-59.

In 1973, Hendricks began a prolonged period of molesting his own stepdaughter and stepson. *Id.* at 157-64. He testified that he knew his behavior was a problem, but that he did not cease it or seek treatment. *Id.* at 160. Hendricks' stepdaughter testified that Hendricks performed oral sex on her several times a month from the time she was approximately 9 until she was 14. *Id.* at 196-97. She testified that, at one point, Hendricks found out that she had had sexual relations with a boy and threatened to tell her mother if she did not do what Hendricks wanted. *Id.* at 202. Hendricks also promised to do favors for her, such as letting her drive the car, in exchange for her allowing him to perform sexual acts on her. *Id.* at 203. Hendricks' stepson also testified that Hendricks performed oral sex on him and fondled his genitals approximately once a week from the time the stepson was about 9 until he was 14. *Id.* at 206-08. The stepson further testified that Hendricks also made him perform oral sex on Hendricks. *Id.* at 208. Again, as with his stepdaughter, Hendricks did favors for the boy, such as providing him with chewing tobacco, in exchange for sex. *Id.* at 208-09.

Hendricks' most recent conviction was in 1984 for the molestation of two 13-year-old boys, *id.* at 165-66, resulting in his serving ten years in prison before his scheduled release in 1994. At the time of these offenses, Hendricks told a police detective that he could not control his urge to touch the boys' penises. *Id.* at 167. Hendricks testified that he had spent half his life since 1955 in prison or in psychiatric institutions. *Id.* at 170. He further testified that when he suffers stress, he is unable to control the urge to engage in sexual activity with a child, declaring that "I can't control the urge when I get stressed out." *Id.* at 172. Hendricks acknowledged that his behavior causes grave harm to children, *id.* at 176, and

agreed that he is a pedophile. *Id.* at 153. Nonetheless, he testified that he believed that "some" of the children he molested enjoyed it, *id.* at 177, and that treatment is "bullshit." *Id.* at 190. Hendricks also testified that he did not believe he was cured of his pedophilia, *id.* at 181, and, in response to the question whether he could promise he would not molest children if released, he stated that "[t]he only way to guarantee that is to die." *Id.* at 190.

The chief psychologist at Larned State Hospital, Dr. Charles Befort, who interviewed and evaluated Hendricks for purposes of the trial court proceeding, testified that Hendricks is a pedophile and is likely to commit sexual offenses against children in the future if permitted. *Id.* at 247-48. Dr. Befort testified that, in his opinion, pedophilia is a "mental abnormality" within the meaning of the Act. *Id.* at 229-33. Dr. Befort also testified that he did not believe that Hendricks had a personality disorder, *id.* at 256, 277, nor, in his opinion, was Hendricks mentally ill within the meaning of the traditional Kansas civil commitment statute. *Id.* at 256, 268. Dr. Befort further testified that, in his opinion, Hendricks would commit new sexual offenses against children if released. *Id.* at 247-48. This opinion was based on Dr. Befort's belief that past behavior is a good predictor of future behavior, the fact that pedophilia commonly involves repeated behavior, Hendricks' failure to demonstrate that he can or desires to control his behavior, Hendricks' lack of understanding of the seriousness of his behavior, and Hendricks' lack of interest in treatment. *Id.* at 248-53. Dr. Befort also testified that, in 1985, Hendricks told a clinician that he acted on his sexual

impulses at least "once per month, twice a month." *Id.* at 241-42.[6]

The jury was instructed to determine whether Hendricks was a "sexually violent predator" and whether he suffered from a "mental abnormality" in language that tracked the statutory definitions of those terms virtually word for word. J.A. 359. The twelve-member jury unanimously returned a verdict finding that, beyond a reasonable doubt, Hendricks is a sexually violent predator within the meaning of the Act. *Id.* at 357-58, 360. The trial court then ordered Hendricks committed to the Larned State Hospital, *id.* at 361-65, where he has remained and is receiving treatment during the pendency of this litigation.[7]

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[6] A forensic psychiatrist Hendricks called as an expert witness, Dr. William Logan, testified that, in his opinion, treatment for sex offenders generally is ineffective, but he acknowledged that some studies show that recidivist rates for sex offenders were reduced from the 10-40% range to a 3-37.5% range with treatment, J.A. 328-29, and that recidivism rates for a child molester is affected by several factors, including "whether he's been treated or not." *Id.* at 349-50. Dr. Logan further testified that, in his opinion, psychiatrists and psychologists cannot accurately predict whether a sex offender is likely to engage in sexual predation in the future. *Id.* at 330-31.

[7] In 1995, while his appeal from the district court order committing him for long-term care and treatment was pending, Hendricks filed a state habeas corpus petition under Kan. Stat. Ann. § 60-1501, alleging that he was not receiving any treatment and, therefore, was entitled to release from the State's care. A state district court held a hearing on the petition on August 28, 1995, and received testimony from Dr. Befort and Janet McClellan, the program director of the Kansas sexual predator treatment unit, about the treatment program provided to sexual predators committed under the Act. J.A. 389-449. Based on their testimony, the district court concluded that Kansas was providing constitutionally adequate treatment and the court denied the request for relief. *Id.* at 451-55.

3. The Kansas Supreme Court's Decision

By a 3-1-3 vote, the Kansas Supreme Court held that the Act violates substantive due process. Pet. App. 1a-59a.

a. The Plurality Opinion

The focal point of the plurality's analysis was this Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992). *See* Pet. App. 9a-20a. In *Foucha*, this Court considered whether the State of Louisiana could continue to detain an insanity acquittee who the state conceded was no longer "mentally ill" but remained dangerous. By a 5-4 vote, with four separate opinions, the Court held that due process prohibited Louisiana from continuing to detain Foucha. The Kansas Supreme Court observed that, in *Foucha*, this Court relied in part on *Addington v. Texas*, 441 U.S. 418 (1979), as holding that a State is required by due process to prove by clear and convincing evidence that a person is both (1) mentally ill and (2) a danger to himself or others, in order to commit the person involuntarily in a civil proceeding. Pet. App. 11a.

The plurality rejected the argument that the constitutional "mental illness" requirement was met by the Act's definition of "mental abnormality." *Id.* at 14a-15a. Instead, the plurality read the preamble to the statute as disavowing any " 'notion that the targeted group of persons are mentally ill.' " *Id.* at 15a (quoting *Young v. Weston*, 898 F. Supp. 744, 749 (W.D. Wash. 1995), *appeal pending*). The plurality inferred that

> the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment

> for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under [the general Kansas involuntary civil commitment statute]. If there is nothing to treat under [that statute], then there is no mental illness.

Id. at 15a.

Moreover, according to the plurality, for federal due process purposes, there is "no support in the Act that a finding of mental illness is required." *Id.* at 17a. "In other words, the record in this case will not support a finding that the statutory requirement of a mental abnormality or a personality disorder is equivalent to the *constitutional standard* of mental illness." *Id.* (emphasis added). The plurality relied on the testimony of Dr. Befort that pedophilia is not considered a personality disorder but is considered a mental abnormality. *Id.* at 18a. In the plurality's view, the term "mental abnormality" does not satisfy the *Foucha* standard of "mental illness" because it "is not a psychiatric or medical term but, rather, a legal term defined in the Act." *Id.* at 19a. The plurality observed that "[t]he term is not defined in DSM-III-R,"[8] *id.*, and "therefore could not be used appropriately in a formal diagnosis." *Id.* The plurality concluded that the definition of "mental abnormality" in the Act would not satisfy the definition of "mental illness" contained in the traditional Kansas involuntary civil commitment statute,

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[8] The reference is to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987), discussed above in note 5. As pointed out in note 5, the most recent revision (1994) is referred to as DSM-IV. For purposes of this brief, the State of Kansas generally will refer to and rely upon DSM-IV, although with respect to pedophilia, there is very little, if any, difference in the two versions' discussion of that mental disorder.

which defines that term to mean a person who (1) is suffering from a severe mental disorder, (2) lacks capacity to make an informed decision concerning treatment and (3) is likely to cause harm to self or others. *Id.* (citing Kan. Stat. Ann. § 59-2902(h)). According to the plurality, "[a]bsent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*." Pet. App. 19a.

The plurality read *Foucha* as mandating a categorical rule that "to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible." *Id.* The plurality concluded that "Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness." *Id.* at 20a. Therefore, "the due process standard of *Addington* and *Foucha* is not met by the Act as applied to Hendricks." *Id.*

b. The Concurrence

The concurring justice, whose vote was decisive, observed that, "[w]ithout violating the Constitution, the State could have incarcerated Hendricks until he exhaled his last breath and his spirit departed this earth, but it did not." Pet. App. 22a (Lockett, J., concurring). He reluctantly agreed that the Kansas Act is unconstitutional, however, "[b]ecause the Washington act, which is almost identical and substantially similar legislation to the Kansas act, was declared unconstitutional by the federal court, and the reasoning of the majority follows the prior decisions of the Supreme Court of the United States. . . ." *Id.* at 24a.

c. The Dissent

The three dissenting justices began by noting that the plurality "fails to address directly what test should be

used to measure the constitutionality of a legislative act attacked on the basis of substantive due process." *Id.* at 33a. The dissent applied strict scrutiny, *id.* at 35a, although it observed that "the Supreme Court recently indicated in *Foucha* that our review might be somewhat less than strict scrutiny." *Id.* at 36a.

In contrast to the plurality, the dissent found *Foucha* distinguishable on the merits:

> It is immediately apparent that *Foucha* is unlike the present case in the very areas that made the Louisiana statute in *Foucha* most offensive. First, under our Act there is no mechanism whereby a person can be confined while mentally healthy solely on the basis of supposed dangerousness. Second, under our Act the burden of proving an ailment of the mind and dangerousness remains always on the State, and always at the high burden of beyond a reasonable doubt.

Id. at 39a-40a. According to the dissent, the plurality opinion "rests on the erroneous conclusion that our Act is constitutionally infirm because it requires no showing of mental illness. It seems to base this conclusion on the absence of those two words. Yet it is not the incantation of 'mental illness' that has constitutional significance, but the substance of the statute." *Id.* at 41a.

The dissent pointed out that " '[t]he Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments. The Court has wisely left the job of creating statutory definitions to the legislators who draft state law.' " *Id.* at 41a-42a (quoting *State v. Post*, 197 Wis.2d 279, 304, 541 N.W.2d 115, 123 (1995)). Thus, "[t]he question is not whether Hendricks fits some clinical definition of mental illness, but whether he fit a legislative

classification that is more than mere idiosyncratic behavior 'within a range that is generally acceptable.' " Pet. App. at 42a (quoting *Addington*, 441 U.S. at 426-27).[9]

The dissenters opined that "[t]here is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the DSM-IV and its frequent revisions," Pet. App. 44a, pointing out that manual's warning that " '[t]he clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments. . . . ' " *Id.* at 44a-45a (quoting DSM-IV, Cautionary Statement, xxvii).

The dissent deemed it " 'irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions.' " *Id.* at 46a (quoting *In re Young*, 122 Wash. 2d 1, 26, 857 P.2d 989, 1000 (1993)). The dissent also concluded that

> The Act is narrowly tailored in a number of particulars. First, it does not apply to sex offenders generally, or even to all sex offenders suffering some ailment of the mind, but applies only to those persons with an ongoing mental condition rendering them likely to commit acts of sexual violence. Second, it does not apply to those susceptible to less restrictive treatment, but only to those who require secure confinement to prevent such violence. Third, to reduce the risk of erroneous detention it does not apply to all persons accused of sexually violent offenses, but only those previously charged or

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[9] Earlier in the opinion, the dissent acknowledged that "[n]owhere is there any requirement that this 'sexually violent predator' must be 'mentally ill' as defined in [the general civil commitment statute]," Pet. App. 28a, although the dissent also aptly observed that "a person subject to the Act could hardly be considered to be mentally healthy." *Id.*

> convicted. Fourth, it does not apply in the face of meager, or even clear and convincing evidence, but requires the State to prove beyond a reasonable doubt that a person qualifies for confinement. Fifth, consistent with its narrowly focused goals, it requires treatment outside the Department of Corrections. Sixth, it has adequate provisions for continuing reviews to ensure that only those persons representing a continuing danger are confined and treated.

Pet. App. 46a.

SUMMARY OF ARGUMENT

Because the Kansas Sexually Violent Predator Act neither offends principles of justice so deeply rooted in the traditions of our people to rank as fundamental nor relies upon a suspect classification, the statute is presumptively constitutional and this Court should apply *reasonableness* review to Hendricks' substantive due process claim. This Court's decisions involving substantive challenges to laws involving mental illness and civil commitment, like its decisions involving such challenges to the substance of state criminal laws, uniformly have applied a reasonableness level of review. The Court repeatedly has recognized that limited federal review accords the proper deference to the States' traditional authority over the substance of their civil commitment and criminal justice systems. *Foucha v. Louisiana*, 504 U.S. 71 (1992), can and should be read as endorsing rather than altering this longstanding level of constitutional review.

The Kansas Act satisfies the basic substantive due process requirements this Court has set forth in past cases. These requirements apparently include proof of (1) *dangerousness* and (2) *mental illness* (neither of which the Court has defined in previous cases). First, the Kansas

Act requires evidence of past conduct and a prediction of likelihood to commit such offenses in the future in order to establish dangerousness, and there is no serious question that Hendricks' 40-year criminal record of sexually molesting children – coupled with his own testimony in this case – establishes his past, present and future *dangerousness* to some of the most vulnerable members of society. Second, for substantive due process purposes, the requirement of *mental illness* – a term this Court has never defined in its cases – is satisfied by the statutory requirement of proof that the person subject to commitment suffers from a "mental abnormality" – such as pedophilia, *see* DSM-IV at 527-28 – that is connected to both past and potential future dangerous conduct. To the extent there are differences of expert medical opinion regarding the diagnosis and classification of mental disorders, the Court previously has warned that courts must pay particular deference to reasonable legislative judgments. Surely it is reasonable for a state legislature to rely on legal concepts that incorporate recognized mental disorders, such as the pedophilia from which Hendricks suffers.

Finally, even if the Court were to apply strict scrutiny, the Kansas Act passes constitutional muster because it is narrowly tailored to serve the dual compelling interests of providing treatment to sexual predators and protecting society from such individuals. Certainly, the Act is more narrowly tailored than a criminal sentence of life imprisonment without parole, which indisputably would be a constitutional option for the State to implement in the circumstances presented. The State of Kansas reasonably has determined to provide Leroy Hendricks with the specialized treatment his condition requires while protecting the children of Kansas from the dire consequences of his unregulated conduct until such time as his mental

abnormality or dangerousness abates. The Kansas Sexually Violent Predator Act is constitutional.

ARGUMENT

THE KANSAS SEXUALLY VIOLENT PREDATOR ACT DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS PRINCIPLES

A. Reasonableness Review Applies To The Substantive Due Process Question

Statutes properly enacted by state legislatures are presumed constitutional, *Heller v. Doe*, 509 U.S. 312, 319 (1993), unless they involve either fundamental rights or suspect classes. *Id. See also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.' " *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). This Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, No. 95-566, slip op. at 5, 116 S. Ct. 2012, 20___ (1996) (plurality opinion). Hendricks' facial challenge to the Kansas statute, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. The fact that an "Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.*

This case involves neither a fundamental right nor a suspect class and therefore is subject to reasonableness

review. Hendricks – as the party challenging a properly enacted statute – thus bears the burden of establishing that the law is unconstitutional by demonstrating that there is no conceivable basis for the Act. *Heller*, 509 U.S. at 320. Importantly, this Court traditionally pays "particular deference to reasonable legislative judgments," *Jones v. United States*, 463 U.S. 354, 365 n. 13 (1983); *see also Marshall v. United States*, 414 U.S. 417, 427 (1974), when expert opinions differ on an issue such as what constitutes "mental illness."

1. This Court's Precedents Support The Application Of Reasonableness Review To Civil Commitments

This Court's decisions confirm that reasonableness review is the appropriate level of review in this case. The Court has *never* purported to apply strict scrutiny to a substantive due process or equal protection claim in an involuntary civil commitment case. Rather, the Court traditionally has applied reasonableness review, largely leaving the *substantive* aspects of state civil commitment statutes – as opposed to *procedural* requirements – to the States with little federal constitutional limitation. It is important that in this Court Hendricks has raised only a substantive, and not a procedural, due process challenge to the Kansas statute. This is not surprising, given that the Kansas statute requires the provision of counsel, the assistance of a mental health professional (at state expense, if necessary), a jury trial and proof beyond a reasonable doubt by the State, among other significant procedural protections.[10]

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[10] *See* Kan. Stat. Ann. § 59-29a05(c)(1) (counsel), -29a06 (counsel, mental health expert, jury trial), -29a07 (proof beyond a reasonable doubt). This difference distinguishes this case from a case such as *Specht v. Patterson*, 386 U.S. 605 (1967), in which

In cases involving substantive due process challenges to commitment systems, this Court has gone no further than to require that, as a constitutional matter, the State apparently must demonstrate that a person subject to commitment is both (1) "mentally ill" and (2) "dangerous." *See, e.g., Foucha*, 504 U.S. at 75-76 (citing *Addington v. Texas*, 441 U.S. 418 (1979)). Nor has the Court constitutionalized any particular definition of either "mental illness" or "dangerousness" as constitutional prerequisites to the invocation of state civil commitment proceedings.

For example, in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), the Court summarily rejected equal protection and due process challenges to a state statute that subjected sex offenders with a "psychopathic personality" to civil commitment proceedings. In *Pearson*, the Minnesota Supreme Court had construed the Minnesota statute to "include" persons "who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." *Id.* at 273. This Court rejected any notion that the law violated substantive due process or that sexual psychopaths subject to the

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the Court struck down the Colorado Sex Offenders Act as violating *procedural due process* principles. In *Specht*, the Colorado statute essentially provided an alternative sentencing proceeding following conviction of a criminal offense but without providing the person with counsel, a hearing, the right to confront witnesses or the right to present evidence. *Id.* at 610. The Court took pains to point out that "[t]he case is therefore quite unlike the Minnesota statute we considered in *Minnesota v. Probate Court*, 309 U.S. 270." *Id.* (footnote omitted).

law were denied equal protection, finding that the question was simply "whether there is any rational basis for such a selection," *id.* at 274, and observing that "[w]e see no reason for doubt upon this point." *Id.*[11]

The law at issue in *Pearson* is known as a "sexual psychopath" law, a category of civil commitment statutes that originated in the 1930s in an effort to provide long-term care and treatment to recidivist sexual offenders, rather than simply punishing them criminally.[12] Sexual psychopath statutes "recognize that the sexual psychopath is neither normal nor legally insane and, for that reason, requires special consideration." *See* V. Woerner, Annotation, *Statutes Relating to Sexual Psychopaths*, 24 A.L.R.2d 350, 351 (1952). The objectives of such statutes were two-fold: "(1) to protect society by sequestering the sexual psychopath so long as he remains a menace to others, and (2) to subject him to treatment to the end that he might recover from his psychopathic condition and be rehabilitated." *Id.* Like this Court in *Pearson*, state courts generally have upheld these statutes against various constitutional challenges, including substantive due process, equal protection, double jeopardy, ex post facto, and self-

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[11] *See also* Katherine T. Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between "Mad" and "Bad" – A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 Notre Dame J. L., Ethics & Pub. Pol'y 227, 237-41 (1996) (discussing the *Pearson* decision). The Court more recently upheld a sexual psychopath law against constitutional challenge in *Allen v. Illinois*, 478 U.S. 364 (1986), rejecting the claim that such laws are criminal in nature and therefore governed by criminal procedure protections, such as the Fifth Amendment privilege against self-incrimination.

[12] *See* Racquel Blacher, Comment, *Historical Perspective of the "Sex Psycopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 Mercer L. Rev. 889, 897-98 (1995).

incrimination challenges. *See id.* at 352, 354-64. As one state supreme court concluded, sexual psychopaths are persons whom the State has "the power to classify as mentally ill and the right to confine and attempt to cure." *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1256, 232 S.W.2d 897, 902 (1950). By 1960, at least twenty-six States and the District of Columbia had some form of sexual psychopath law[13] and, indeed, Hendricks himself was civilly committed under such a law in the state of Washington in 1964. J.A. 142-44. By 1990, approximately half the States had repealed their sexual psychopath laws as part of a trend to punish rather than treat sex offenders.[14] Some states, however, continue to utilize either the 1930s sexual psychopath laws, or a modern version.[15]

Thus, the recent move toward sexual predator statutes is not particularly novel or unprecedented but, instead, represents a return to treatment of sex offenders. One difference, however, between the 1930s vintage sexual psychopath laws and the recently enacted sex predator statutes is that the former generally provided for treatment in lieu of criminal punishment while the latter often provide for treatment after criminal punishment. For substantive due process purposes, this distinction should make no difference. Whether civil commitment precedes a criminal action, proceeds contemporaneously with such an action, or follows such proceedings, the substantive due process question remains one of defining the bases on which the State may provide for involuntary

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[13] *See* Blacher, *supra* note 12, at 903.

[14] *Id.* at 906-07.

[15] Minnesota, for example, has both its original statute, *see* Minn. Stat. § 526.09 *et seq.*, and a more recent sexually dangerous persons statute. *See* Minn. Stat. § 253B.02, subd. 7a, 18a, 18b.

civil commitment.[16] The choice a state makes in this regard is one the Court historically has reviewed only for *reasonableness*. *See, e.g., Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("the nature and duration of commitment [must] bear some *reasonable relation* to the purpose for which the individual is committed") (emphasis added); *see also O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979).

2. This Case Involves Neither A Fundamental Right Nor A Suspect Class

The State of Kansas does not question the proposition that individuals subject to involuntary civil commitment under sex predator statutes have a constitutionally protected liberty interest at stake. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 492 (1980); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982); *Jones v. United States*, 463 U.S. 354 (1983); *Foucha*, 504 U.S. at 80. That interest, however, is not absolute and restrictions on that interest are not automatically subject to strict scrutiny. A contrary conclusion would result in the application of strict scrutiny to virtually all aspects of the States' criminal laws and criminal justice systems, including the substance of state criminal offenses and the punishments authorized under statutes or sentencing guidelines. The result would be chaos, as many aspects of the States' criminal justice systems undoubtedly would be invalidated by strict scrutiny review.

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[16] Any argument based on the timing of civil commitment proceedings with respect to possible or actual criminal proceedings is irrelevant to the substantive due process question. To the extent that such an argument may be relevant to Hendricks' contentions that the act violates double jeopardy or ex post facto principles, Kansas will address the argument in its brief responding on those issues.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court made clear that the presence of a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment does not alone require the invocation of strict scrutiny. Rather, in addressing an involuntary civil committee's claim that he had due process rights to safe conditions and freedom from bodily restraint, the Court observed that liberty interests "are not absolute." *Id.* at 319-20. The Court declared that, "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' " *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). The Court then articulated a reasonableness test, holding that " 'the Constitution only requires that the courts make certain that professional judgment [of mental health professionals] in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' " *Id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (en banc) (Seitz, C.J., concurring)).[17]

This Court recently observed that "[w]e have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill." *Heller v. Doe*, 509 U.S. 312, 321 (1993). In *Heller*, the Court applied rational basis review in upholding Kentucky's use of different statutory civil commitment procedures for mentally

[17] *See also Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990) ("determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests' " (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (footnote omitted)).

retarded as opposed to mentally ill persons.[18] In so doing, the Court cited two of its prior decisions for the proposition that strict scrutiny did not apply in such circumstances. The first case cited was *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), in which this Court rejected an equal protection challenge to a municipal ordinance that restricted the locations in which group homes for the mentally retarded could be operated. The Court also cited *Schweiker v. Wilson*, 450 U.S. 221 (1981), in which the Court rejected an equal protection challenge to a federal funding scheme that denied certain funds to residents of public mental institutions.

Thus, this Court's decisions dealing with substantive due process or equal protection challenges in civil commitment cases and cases involving persons suffering from various mental conditions uniformly apply rational basis or reasonableness review.[19] Certainly, the Court has not purported to apply strict scrutiny, nor has it recognized

[18] The parties in *Heller* apparently had agreed throughout the lower court proceedings that rational basis review was the appropriate level of review, and so this Court also applied that standard without deciding whether it was the proper level of review. 509 U.S. at 318-19.

[19] At least one state court expressly has applied rational basis review in addressing substantive due process and equal protection challenges to a state sexual psychopath statute. *See, e.g., People v. White*, 656 P.2d 690 (Colo. 1983) (Colorado Sex Offenders Act serves legitimate legislative objective and is rationally related to accomplishment of that objective); *People v. Kibel*, 701 P.2d 37 (Colo. 1985) (classification of sex offenders under Colorado act did not create suspect class or infringe on fundamental right). *See also* Simeon Schopf, *"Megan's Law": Community Notification and the Constitution*, 29 Colum. J.L. & Soc. Probs. 117, 122-27 (1995) (concluding that sex offenders are not a suspect class under this Court's cases, nor do community notification laws infringe on any fundamental rights).

the presence of either fundamental rights or a suspect class that would warrant a heightened level of review.

3. Reasonableness Review Accords The Proper Respect To The States

Important in this case is the Court's historic respect for federalism in the involuntary commitment context:

> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised – for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity – reflects different combinations of distinct bases for commitment sought to be vindicated.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (footnotes omitted). The same is true of the Court's approach to the States' criminal laws. As one Justice recently noted, the "States enjoy wide latitude in defining the elements of criminal offenses. . . . " *Montana v. Egelhoff*, slip op. at 3, 116 S. Ct. at 20___ (1996) (Ginsburg, J., concurring in the judgment). Thus, "[w]hen a State's power to define criminal conduct is challenged under the Due Process Clause, we inquire only whether the law 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)); *see also* slip op. at 9, 116 S.Ct. at 20___ (plurality opinion) (stating the same principle).

Application of reasonableness review to the substance of state involuntary commitment systems reflects a proper respect for federalism. In *Addington v. Texas*, 441 U.S. 418, 431 (1979), a civil commitment case, the Court

declared that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."[20] Particularly when a state legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Marshall v. United States*, 414 U.S. 417, 427 (1974). In addressing the substantive due process requirement of dangerousness, this Court has rejected the argument that legislative choices necessarily must be justified by empirical, scientific or medical evidence, rather than ordinary reasonableness.

> We do not agree with the suggestion that . . . power to legislate in this area depends on the research conducted by the psychiatric community. . . . The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to *reasonable* legislative judgments.

Jones v. United States, 463 U.S. 354, 365 n. 13 (1983) (emphasis added).[21]

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[20] *See also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right [of the States] to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[21] The "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge [of right and wrong] should determine criminal responsibility." *Leland v. Oregon*, 343 U.S. 790, 801 (1952). In rejecting the argument that the Constitution requires States to recognize alcoholism as a defense to a criminal charge of public intoxication, this Court warned that

Thus, this Court's precedents, as well as principles of federalism, strongly point toward the conclusion that reasonableness review – not strict scrutiny – applies to Hendricks' substantive due process challenge to the Kansas Sexually Violent Predator Act.[22]

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.
>
> Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . [F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Powell v. Texas, 392 U.S. 514, 535-37 (1968) (Marshall, J.) (plurality opinion) (footnote omitted). *See also Montana v. Egelhoff*, No. 95-566, 116 S. Ct. 2012 (1996) (plurality opinion) (holding that due process does not require a State to permit a voluntary intoxication defense to a criminal charge).

[22] As demonstrated below in subpart C., even were this Court to apply strict scrutiny, the Kansas statute would pass constitutional muster, as the dissenting Justices of the Kansas Supreme Court concluded in this case. *See* Pet. App. 46a.

4. This Court's Decision In *Foucha v. Louisiana* Can And Should Be Read As Applying A Reasonableness Test

The lower court decisions addressing the constitutionality of sex predator statutes have turned in part upon their understanding that this Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992), requires the application of heightened scrutiny. *Foucha* does not so hold, however; indeed, that reading of *Foucha* is incorrect. All of the opinions in *Foucha* indicate that the Court was applying a reasonableness standard to Foucha's substantive due process claims. The members of this Court, however, disagreed on whether it was reasonable to make Foucha bear the burden of affirmatively establishing that he was no longer dangerous and could be released safely.

Justice White's opinion for the Court expressly referred to *reasonableness*; it never mentioned strict scrutiny. The opinion declared that "[d]ue process requires that the nature of commitment bear *some reasonable relation* to the purpose for which the individual is committed." *Foucha*, 504 U.S. at 79 (emphasis added). Even in Part III of the opinion, which spoke only for a plurality, strict scrutiny was not invoked in addressing Foucha's equal protection claim. *See id.* at 86 (observing that the "State must have a particularly convincing reason" to support having different commitment and release procedures for insanity acquittees).[23] Similarly, Justice O'Connor, who provided the fifth vote for the outcome in *Foucha*, did not purport to apply strict scrutiny. Rather,

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[23] In past decisions, Justice White had expressed strong distrust of intrusive judicial review under the rubric of substantive due process analysis, pointing out that "the substantive content of the Clause is suggested neither by its language nor by preconstitutional history." *Moore v. City of East Cleveland*, 431 U.S. 494, 543-44 (1977) (White, J., dissenting).

she acknowledged that " '[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . . ' " *Id.* at 87 (O'Connor, J., concurring) (quoting *Jones v. United States*, 463 U.S. 354, 365 n. 13 (1983)). She further admonished that "[g]iven this uncertainty, 'courts should pay particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness." *Id.* Likewise, Justice Kennedy's dissent declared that "upon compliance with *In re Winship* [397 U.S. 358 (1970)], the State may incarcerate on any *reasonable* basis." 504 U.S. at 93 (Kennedy, J., dissenting) (emphasis added).

Justice Thomas, in his dissent joined by the Chief Justice and Justice Scalia, expressly articulated the level of review he was applying to the Louisiana statute at issue. Justice Thomas made clear that, in his view, strict scrutiny did *not* apply to Foucha's substantive due process claim:

> Certain substantive rights we have recognized as "fundamental"; legislation trenching upon these is subjected to "strict scrutiny," and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring. Such searching judicial review of state legislation, however, is the exception, not the rule, in our democratic and federal system; we have consistently emphasized that "the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." Except in the unusual case where a fundamental right is infringed, then, federal judicial scrutiny of the substance of state legislation under the Due Process Clause of the Fourteenth Amendment is not exacting.

Id. at 115 (Thomas, J., dissenting) (quoting *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985)).

Justice Thomas observed that "this Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill, much less to laws involving the confinement of insanity acquittees." *Id.* at 119 (emphasis original). Reading *Foucha* to apply a heightened level of review would work

> a revolution in the treatment of the mentally ill. Civil commitment as we know it would almost certainly be unconstitutional; only in the rarest of circumstances will a State be able to show a "compelling interest," and one that can be served in no other way, in involuntarily institutionalizing a person. All procedures involving the confinement of insanity acquittees and civil committees would require revamping to meet strict scrutiny.

Id. at 122. Thus, the reading of *Foucha* which comports with this Court's precedent and its historical respect for federalism is that *reasonableness* review applies to substantive due process claims made in the civil commitment context. Nothing in the several opinions in *Foucha* prevents the Court from reinforcing that traditional understanding.

B. The Kansas Sexually Violent Predator Act Comports With Due Process

1. Due Process At Most Requires Proof Of Dangerousness And A Mental Condition That Reasonably Can Be Characterized As "Mental Illness"

This Court has held that the Due Process Clause of the Fourteenth Amendment "contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331

(1986)). The constitutionality of the Kansas Sexually Violent Predator Act thus turns upon the interpretation of a line of this Court's decisions that address substantive due process claims in the mental health context. As explained below, these decisions apparently establish that the State must prove that Hendricks is both (1) *dangerous* and (2) *mentally ill*. *See Foucha*, 504 U.S. at 75-76. The decisions have not, however, defined the term "mental illness," and certainly have not confined it to any particular clinical categories.

In *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975), this Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." The jury in *Donaldson* specifically found that "Donaldson was neither dangerous to himself nor dangerous to others." *Id.* at 573. *Donaldson* stands for the proposition that the mentally ill cannot be involuntarily committed absent proof of dangerousness, *i.e.*, they cannot be warehoused, for example, simply to get them out of the public's sight.

In *Addington v. Texas*, 441 U.S. 418 (1979), a procedural due process case, the Court held that involuntary commitment proceedings require proof that the individual satisfies the State's substantive standards for commitment by clear and convincing evidence. The Texas law at issue required proof of both mental illness and dangerousness. *Id.* at 426. Although *Addington* was not a substantive due process case, later decisions of this Court have treated the Texas statutory elements of mental illness and dangerousness as substantive due process requirements. For example, *Jones v. United States*, 463 U.S. 354 (1983), held that a defendant acquitted of a crime by reason of insanity could be confined to a mental institution until such time as he either regained his sanity or no longer presented a danger to himself or society, citing

Addington for the proposition that "the Due Process Clause requires the State in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." *Id.* at 362.

Foucha, upon which the Kansas Supreme Court principally relied, repeated this formulation, holding that "keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." 504 U.S. at 78. Like the earlier cases, however, the Court had no occasion to define the requisite "mental illness" in *Foucha* because "Louisiana [did] not contend that Foucha was mentally ill at the time of the trial court's hearing." *Id.* Moreover, the Louisiana statute at issue in *Foucha*, unlike the Kansas statute at issue here, placed the burden of proof on Foucha to prove that he was not dangerous, and the record contained no affirmative testimony that Foucha would in fact pose a danger to the community, only testimony by mental health professionals that they would not state with certainty that he posed no danger. *Id.* at 81-82.

2. The Kansas Act Satisfies The Dangerousness Requirement

In this case, there is no question that the dangerousness requirement is satisfied. The Act can be invoked only when a person "has been convicted of or charged with a sexually violent offense," Kan. Stat. Ann. § 59-29a02(a), and "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence. . . . " *Id.* Thus, the statute requires proof of more than predisposition or the possibility of predisposition; in fact, it requires evidence of past sexually violent behavior or conduct and a mental condition that creates a likelihood of such conduct in the future if the person is not committed and treated.

Indeed, neither the plurality nor the dissenting opinion in the Kansas Supreme Court expressed any doubt that the Act satisfies the constitutional "dangerousness" requirement, nor did Hendricks raise such a contention in his response to the State's petition for a writ of certiorari in this Court. Moreover, the Act's dangerousness element is more substantial than the general Kansas civil commitment statute which requires a showing that the person "[i]s likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another's property, as evidenced by behavior causing, attempting or threatening such injury, abuse or damage." Kan. Stat. Ann. § 59-2902(g). The Act's requirement of proof of either criminal charges or a conviction, in addition to proof that the predator is likely to commit such offenses in the future, requires the State to prove considerably more than is required under the general civil commitment statute. Under the Act, the State had to prove, beyond a reasonable doubt, that Hendricks poses a danger to people – such as young children – not just a danger to "property." Hendricks has not, and realistically could not, question the constitutional adequacy of the Kansas civil commitment statute in this respect. *See, e.g., In re Albright*, 17 Kan. App. 2d 135, 138-43, 836 P.2d 1, 3-6 (1992) (rejecting constitutional challenge to § 2902(g)).

In sum, the Act requires evidence of conduct or behavior, not just speculation, that is connected to an abnormal mental condition and which supports a prediction of future dangerousness to innocent victims.[24] The

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[24] Although the precise levels of recidivism for various categories of sex offenders are the subject of some dispute due to a range of estimates presented in numerous studies, there is no serious dispute that recidivism rates are significant, particularly in some categories, such as pedophiles/child molesters. For example, one study concluded that "[t]he most impressive finding is the enormously high frequency of paraphiliac behaviors reported by various categories of paraphilia," G. G. Abel, *et al.*, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 Journal of Interpersonal Violence 3, 21 (Mar. 1987), pointing out that the number of offenses reported by "nonincarcerated child molesters was from *23.2 acts to 281.7 acts per offender.*" *Id.* (emphasis added). *See also The Handbook of Sexual Assault* 15 (1990) (W.L. Marshall, *et al.* eds) (presenting statistics in table format). Hendricks' expert in this case, Dr. William Logan, testified that the "general consensus in the field" is that conviction rates underestimate the true extent of recidivism among sexual offenders. J.A. 322.

danger Leroy Hendricks presents to the children of any community in which he might reside if released is all too obvious from his past 40-year criminal record[25] of indiscriminately molesting boys and girls ranging in age from 7 to 14, and his own testimony in the trial court proceedings in this case. The Act indisputably satisfies the substantive due process requirement of dangerousness.

3. The Kansas Act Requires Constitutionally Adequate Proof Of Mental Illness

The only due process issue in this case is whether the Act's requirement of either a "personality disorder," or a "mental abnormality," such as Leroy Hendricks' diagnosis of "pedophilia" – a recognized "mental disorder," *see* DSM-IV at 527-28 – suffices as proof of "mental illness" for constitutional purposes.

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[25] "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." *Jones v. United States*, 463 U.S. 354, 364 (1983).

a. Constitutional Requirements Are Satisfied By Proof Of A Recognized Mental Condition

The Kansas Sexually Violent Predator Act defines a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility." Kan. Stat. Ann. § 59-29a02(a). The Act further provides that " '[m]ental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." § 59-29a02(b). Thus, in order to commit Hendricks under the Act, the State was required to prove that Hendricks suffers from either a "mental abnormality" or a personality disorder that makes him a dangerous sexual predator.

At the sexual predator trial, Dr. Charles Befort, the chief psychologist at a state mental hospital, testified that ordinarily a "mental abnormality" is not a formal diagnosis, and is not defined in DSM-III, but is a clinical phrase used to discuss abnormality or deviance. J.A. 229-33. He further testified that he did not diagnose Hendricks as having a personality disorder, *id.* at 256, 277, nor did he believe him to be "mentally ill" within the meaning of the Kansas civil commitment statutes. *Id.* at 256, 268. Dr. Befort offered his opinion, however, that Hendricks is a pedophile with a mental abnormality that makes him likely to engage in predatory acts of sexual violence or sexual activity with children if given the opportunity. *Id.* at 229-33, 247-48. Because the jury concluded, beyond a reasonable doubt, that Hendricks is a dangerous sexual predator who suffers from a "mental

abnormality," *id.* at 357-58, 360, the question presented to this Court is whether the statutory definition of "mental abnormality" satisfies the constitutional "mental illness" requirement.

In the line of decisions discussed above, this Court has never purported or attempted to define "mental illness" for substantive due process purposes. Although the Court has referred to proof of "mental illness" as a constitutional requirement, the Court itself has utilized various terms in its opinions such as "mental disorder," "mental disease," "emotional disorder," "emotionally disturbed," and "insane." *See, e.g., Addington v. Texas*, 441 U.S. 418, 425-26 (1979).[26] The Court's use of this variety of terminology is not surprising, given the Court's recognition that "psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985).

Indeed, there is no single, medically accepted definition of mental illness. For example, the term "mental illness" is not defined in DSM-IV, which is neither in design or fact prepared for legal purposes, but rather as an explanation of current thought among the medical community. The manual itself cautions that

> although this manual provides a classification of mental disorders, it must be admitted that no

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[26] *See also O'Connor v. Donaldson*, 422 U.S. 563, 573-74 (1975) (declining to decide when "a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement"); Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 Hous. L. Rev. 775, 799 (1995) ("the Court has never attempted to articulate a clear due process standard for the permissible substantive content of statutory definitions of mental illness").

> definition adequately specifies precise boundaries for the concept of "mental disorder." The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations. . . .

DSM-IV at xxi. Indeed, the manual recognizes that "[i]n determining whether an individual meets a specified legal standard . . . , additional information is usually required beyond that contained in the DSM-IV diagnosis." *Id.* at xxiii. The manual specifically warns that

> [i]t must be noted that DSM-IV reflects a consensus about the classification and diagnosis of mental disorders derived at the time of its initial publication. New knowledge generated by research or clinical experience will undoubtedly lead to an increased understanding of the disorders included in DSM-IV, to the identification of new disorders, and to the removal of some disorders in future classifications. The text and criteria sets included in DSM-IV will require reconsideration in light of evolving new information.

Id.

The term "mental abnormality" does not have a clinical definition, but neither do other legal concepts in mental health law such as "insanity" or "competency." "It is by now well established that insanity as defined by the criminal law has no direct analog in medicine or science." *Foucha*, 504 U.S. at 96 (Kennedy, J., dissenting). Rather, the statutory definition of "mental abnormality" becomes meaningful when mental health professionals give the definition content by identifying specific mental disorders that may or may not satisfy the definition. It is clear that trained professionals can give content to the statutory requirements of "personality disorder" or "mental abnormality" contained in the Kansas Act.

For instance, "paraphilias," as defined by DSM-IV, are characterized by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) non-human objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months." DSM-IV at 522-23. A paraphilia diagnosis will not include one-time occurrences, nor do occurrences attributable to mental retardation, dementia, substance abuse or schizophrenia satisfy the conditions for diagnosis. *Id.* at 525. Not all deviant sexual behavior constitutes a paraphilia, and not all paraphilias will constitute a "mental abnormality" under the statute. At least two specific and well-recognized paraphilias, however, do satisfy the statutory definition of "mental abnormality." These include *pedophilia* (Hendricks' diagnosis), and *sexual sadism*. *See id.* at 527-28, 530.

Thus understood, the Kansas statute clearly is distinguishable from the situation the Court addressed in *Foucha*. In *Foucha*, the uncontroverted evidence in the trial court was that "there had been no evidence of mental illness since [Foucha's] admission," 504 U.S. at 74, and that Foucha mentally was in "good shape." *Id.* at 75. Nonetheless, under Louisiana law, Foucha (as an insanity acquittee) had the burden of affirmatively establishing that he posed no danger to society if released from confinement. By contrast, Hendricks' diagnosis in this case was that he displays the paraphilia of "pedophilia," a recognized mental disorder. Thus, the Kansas "mental abnormality" requirement – both on its face and as applied in this case – is constitutionally sufficient.

The mere fact that the Kansas statute speaks in terms of a "mental abnormality" and not "mental illness" cannot alone be of any constitutional significance. Thus, the Kansas Supreme Court erred in concluding that the Act failed to satisfy the constitutional "mental illness" requirement simply because the preamble recognizes that

sex predators might not be subject to involuntary commitment under the general Kansas commitment statutes and that they require different treatment methods and often longer periods of treatment than other persons subject to involuntary commitment. The Kansas Legislature did not use the term "mental abnormality" to circumvent or water down substantive due process requirements, but rather to limit the Act's reach to a specific and narrow group of sex offenders who suffer from identifiable mental disorders that make them particularly dangerous to society generally, and to some of the most vulnerable members of society in particular.[27]

For substantive due process purposes, the real question is whether mental health professionals trained in the identification and diagnosis of sexual pathologies are able to identify specific mental disorders, such as pedophilia in Hendricks' case, which in the past have led the person to commit sexually violent offenses and likely will cause the individual to do so in the future if released without treatment. There can be no doubt that the answer to that question is "yes."

b. The Act Requires Treatment Of Sex Predators

To the extent the Kansas Supreme Court may have relied on the notion that Hendricks' mental condition – pedophilia – either was not treatable or would not be

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[27] This Court generally eschews inquiry into legislative motives or purposes and relies instead on the language of the statute itself. Indeed, this Court long has recognized that judicial investigations into legislative motives are a hazardous matter. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 384 (1968). Generally, the Court will not attribute to a legislature the "intent to pass legislation that is inconsistent with the Constitution as construed by this Court." *United States v. X-Citement Video, Inc.*, 513 U.S. ___, ___, 115 S. Ct. 464, 470 (1994).

treated,[28] that court was simply in error. The preamble to the Act does not declare that sex predators are untreatable or will not receive treatment. Rather, the legislature found that "the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under" the general civil commitment statute. § 59-29a01. Moreover, the statute affirmatively requires that "[t]he involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment." § 59-29a09. With respect to Hendricks' facial challenge to the Act, that is the end of the matter. On its face, the Act requires treatment, and it is Hendricks' burden to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Moreover, even as applied, Hendricks' challenge must fail in this respect. Two Kansas courts have made a factual determination – with respect to Hendricks himself – that Kansas is providing treatment to its sex predators. Following a hearing on Hendricks' motion for a new trial in this case, the trial court denied the motion, concluding that "I feel that the arguments of the defendant in regards to there not being a treatment program available are not sufficient because I believe that the Secretary of Social and Rehabilitation Services has established a treatment program." J.A. 387.

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[28] *See* Pet. App. 15a ("Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. § 59-2901 *et seq.* If there is nothing to treat under 59-2901, then there is no mental illness.").

At an August 28, 1995, hearing on a petition by Hendricks for habeas corpus relief under Kansas law – again on the ground that the State's sexual predator treatment program was inadequate – two state officials testified regarding the Kansas program. The first was Dr. Charles Befort, the same psychologist who testified in Hendricks' sexual predator trial. Dr. Befort explained that the program "has plenty of funding and we have lots of space." *Id.* at 395. He acknowledged that the program had taken some time to get up and running, *id.* at 405-06, but testified that "the foundation for an excellent program is laid" and it was "about ready to start up full steam." *Id.* at 413. He also explained that some delays are inherent in establishing a program of this nature. *Id.* at 413-15. The other witness was Janet McClellan, the program director for the Kansas sexual predator treatment unit. She testified that Kansas had started the program from scratch following the enactment of the statute and that some delays had occurred in implementing the program but that, as of the date of the hearing, the program was nearly fully staffed and operational. *Id.* at 421-47. On the basis of this evidence, the trial court ruled that "I have to conclude that the allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment." *Id.* at 453-54.

The notion that the State should provide treatment to those involuntarily committed to state mental institutions has never been understood to mean that the State necessarily must succeed in "curing" the individual committed. Otherwise, the States might be constitutionally compelled to release all sorts of committed individuals who are both mentally ill and dangerous simply because the State cannot "cure" them of their afflictions. Nor should the Court impose a constitutional requirement

that a treatment program must result in significant improvements in recidivism rates in order for the patient's condition to qualify as "mental illness" for substantive due process purposes. Treatment sometimes is ineffective, or less than fully effective, for the simple reason that the individual refuses to cooperate, as Leroy Hendricks apparently refused for many years. Moreover, "it remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low." *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring). But that does not automatically transform a treatment program into a criminal sentence or other form of punishment. It should be the State's efforts to treat the committed individual, and not necessarily the State's success in doing so, which ultimately determines whether the constitutional "mental illness" standard is satisfied. Indeed, a number of studies have reported success in treating sex offenders.[29]

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[29] *See, e.g.*, Mary Barker, *What Do We Know About the Effectiveness of Cognitive-Behavioral Treatment for Sex Offenders?*, 2 J. Mental Health 97 (1993); Ann S. Fordham, *An Evaluation of Sex Offender Treatment Programmes*, 19 Issues in Criminalogical & Legal Psychology 60 (1993); Margit C. Henderson *et al.*, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, 61 Psychiatric Quarterly 273 (1990); William L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 Criminal Justice & Behavior 11 (1994); William L. Marshall, *The Treatment of Sex Offenders: What Does Outcome Data Tell Us?*, 8 J. Interpersonal Violence 524 (1993); William L. Marshall *et al.*, *Treatment Outcome with Sex Offenders*, 11 Clinical Psychology Rev. 465 (1991); Daniel L. Whitaker *et al.*, *Treatment of Sexual Offenders in a Community Mental Health Center: An Evaluation*, 7 J. Social Work & Human Sexuality 49 (1988).

In *Allen v. Illinois*, 478 U.S. 364 (1986), this Court held that commitment proceedings under the Illinois Sexually Dangerous Persons Act, a sexual psychopath statute, were not "criminal" within the meaning of the Fifth Amendment's privilege against self-incrimination. In reaching that conclusion, the Court recognized that the Illinois law's purpose – like the Kansas law in this case – was to provide treatment, not punishment, for persons adjudged sexually dangerous. *Id.* at 370. The Court concluded that the petitioner had not demonstrated that the conditions of confinement were "incompatible with the State's asserted interest in treatment," *id.* at 373, and the Court observed that committed individuals were treated differently than convicted felons. *Id.* at 373-74.

Although *Allen* involved a Fifth Amendment question, and not a substantive due process claim, many of the Court's observations ring true with respect to the Kansas Sexually Violent Predator Act in the substantive due process context.[30] The stated purpose of the Kansas

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[30] Two state supreme courts have relied upon *Allen* in part to reject substantive due process challenges to sexual predator statutes that are virtually identical to the Kansas Sexually Violent Predator Act. *See In re Young*, 122 Wash.2d 1, 19-21, 25, 857 P.2d 989, 997, 1000 (1993) (upholding the Community Protection Act of 1990, Wash. Rev. Code § 71.09 *et seq.*); *State v. Post*, 197 Wis.2d 279, 307-11, 541 N.W.2d 115, 124-26 (1995), *cert. pending*, No. 95-8204 (upholding the Sexually Violent Person Commitments Act, Wis. Stat. ch. 980). A number of commentators have concluded that sexual predator laws are constitutional. *See, e.g.*, Blakey, *supra* note 11; Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709 (1992); Matthew J. Herman, Note, *Are the Children of Illinois Protected from Sex Offenders?*, 28 J. Marshall L. Rev. 883 (1995); Marie A. Bochnewich, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 Cal. W. L. Rev. 277 (1992); Norm Maleng, *The Community Protection Act and the Sexually*

law is to provide treatment to sexually violent offenders, *see* Kan. Stat. Ann. § 59-29a01, and, indeed, the State of Kansas has gone to considerable expense and effort to establish a meaningful treatment program. Requiring the commission of a sexually violent offense in order to trigger the Act and providing procedural safeguards such as representation by counsel, the assistance of a mental health professional (at State expense, if necessary), a jury trial, and a requirement of proof beyond a reasonable doubt simply do not, under *Allen*, invalidate or undermine the State's interest in treatment. Likewise, housing committed sex predators in a secure mental health facility, where they receive treatment and are not treated like convicted felons in an ordinary prison, is completely consistent with the State's treatment objectives.

C. Even Were This Court To Apply Strict Scrutiny, The Kansas Sexually Violent Predator Act Passes Muster

Finally, even if this Court determines that strict scrutiny is the appropriate level of review to apply to the Kansas statute in evaluating Hendricks' substantive due

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Violent Predators Statute, 15 U. Puget Sound L. Rev. 821 (1992); Andrew Horwitz, *Sexual Psychopath Legislation: Is there Anywhere to go but Backwards?*, 57 U. Pitt. L. Rev. 35 (1995); Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 Kan. L. Rev. 887 (1994); David Boerner, *Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. Puget Sound L. Rev. 525 (1992); Juliet Dupuy, Comment, *The Evolution of Wisconsin's Sexual Predator Law*, 79 Marq. L. Rev. 873 (1996); Claudine M. Leone, *New Jersey Assembly Bill 155 – A Bill Allowing the Civil Commitment of Violent Sex Offenders After the Completion of a Criminal Sentence*, 18 Seton Hall Legis. J. 890 (1994); Sarah H. Francis, Note, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 Suffolk L. Rev. 125 (1995).

process claim, the outcome remains the same. Strict scrutiny requires that the State demonstrate that the challenged statute both (1) serves a compelling governmental interest and (2) is narrowly tailored to advance that interest. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. ___, 115 S. Ct. 2097, 2117-18 (1995). Although strict scrutiny involves a more intensive and rigorous judicial inquiry than reasonableness review, this Court recently expressed its desire "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment) (1980)).

The Kansas statute satisfies both requirements of the strict scrutiny test. First, the States without a doubt have compelling interests in treating sexual predators and protecting the public from them. No court has suggested otherwise, nor can such a suggestion seriously be made. Leroy Hendricks alone has been *convicted* of committing sexual offenses against no fewer than ten young children, ranging in age from 7 to 14. The impact of his conduct on his young and vulnerable victims is difficult to fathom and unquestionably significant.

Second, the Act is narrowly tailored to advance the State's dual interests of treating the individual and protecting the community. The Act applies only to persons who have committed sexually violent offenses and who suffer from an identifiable mental disorder which renders them likely to continue committing acts of sexual violence. § 59-29a02(a), (b). The Act does not apply to those who have unacceptable fantasies; it only applies to persons who have actually been charged with or convicted of sexually violent offenses. § 59-29a02(a). In accordance with the goal of treatment, the Act requires that persons committed under it be located and receive treatment either in a facility outside the state prison system or, if housed in correctional facility, in segregation from the inmate population. § 59-29a07(a). The Act specifically requires regular reviews of each committed individual's

situation to ensure that only those persons who continue to suffer from a mental condition and who represent a continuing danger to society remain in the State's custody for treatment, § 59-29a08, as well as providing for petitions for release initiated by either the person or the state agency responsible for treating the person. §§ 59-29a10, 59-29a11. Lastly, the Act provides significant procedural protections such as representation by counsel, Kan. Stat. Ann. § 59-29a05(c)(1), -29a06, the assistance of a mental health expert (at State expense, if necessary), § 59-29a06, a jury trial, *id.*, and proof by the State beyond a reasonable doubt. § 59-29a07.

Certainly, the Kansas Sexually Violent Predator Act is more narrowly tailored than would be a statute imposing life imprisonment on all repeat child molesters, an option that is indisputably constitutional. Likewise, it is more narrowly tailored than simply expanding the "mental illness" definition already contained in the traditional Kansas civil commitment statute. Because the latter option undoubtably would give rise to substantial constitutional questions of the type raised in this case, life imprisonment without parole for all repeat sex offenders may be the only realistic alternative remaining to the States if laws such as the Kansas Sexually Violent Predator Act violate substantive due process principles.

The Kansas Sexually Violent Predator Act is constitutional. It provides for the civil commitment – with extensive procedural safeguards – of sexually violent predators such as Hendricks, who has a medically recognized mental disorder, who repeatedly has committed sexually violent offenses, and who, by his own admission, will continue to prey on vulnerable children if released without treatment. The State of Kansas reasonably has decided to provide Hendricks with the specialized psychiatric treatment he so desperately needs while protecting the children of Kansas from the shattering consequences of his sexual abuse. The Constitution should not be interpreted to condemn these efforts.

CONCLUSION

For the foregoing reasons, Petitioner State of Kansas respectfully requests that this Court reverse the decision of the Kansas Supreme Court and hold that the Kansas Sexually Violent Predator Act does not violate substantive due process principles.

Respectfully submitted,

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